APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
November Term, 1973

No. 72-1887

RINGSBY TRUCK LINES, INC., RIO GRANDE MOTOR WAY, INC., NAVAJO FREIGHTLINES, INC., ILLINOIS-CALIFORNIA EXPRESS, INC., DC INTERNATIONAL, INC., CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE, GARRETT FREIGHTLINES, INC., IML FREIGHT INC., LEE WAY MOTOR FREIGHT, INC., PACIFIC INTERMOUNTAIN EXPRESS CO., T.I.M.E. FREIGHT, INC., TRANSCON LINES, UNITED-BUCKINGHAM FREIGHT LINES, WATSON-WILSON TRANSPORTATION SYSTEM, INC., and WESTERN GILLETTE, INC.,

Appellees,
(Plaintiffs below)

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
(Defendants below)

v.

THE NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC. and DRUG AND TOILET PREPARATION TRAFFIC CONFERENCE,
Appellants.
(Intervening Defendants below)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

(67-C-97)

Decided December 13, 1973

William Q. Keenan, New York, New York (James L. Tilly, Denver, Colorado, and of counsel, Arsham & Keenan, New York, New York, and Tilly & Graves, Denver, Colorado, with him on the brief) for Appellants.

Alvin J. Meiklejohn, Jr., Denver, Colorado (David E. Driggers, of Jones, Meiklejohn, Kehl & Lyons, Denver, Colorado and Z. L. Pearson, Jr., William E. Kenworthy and Gerald W. Hess, Denver, Colorado, were with him on the brief) for Appellees.

Before LEWIS, Chief Judge; BARRETT and DOYLE, Circuit Judges.

LEWIS, Chief Judge.

This appeal is brought by the National Small Shipments Traffic Conference, Inc. and the Drug and Toilet Preparation Traffic Conference, intervening defendants below, from the judgment of a statutory three-judge court convened in the United States District Court for the District of Colorado. The court vacated and set aside an Interstate Commerce Commission rate cancellation order and remanded the matter to the Commissioin for further proceedings.

A full understanding of the issues presented here requires a detailed accounting of the complex procedural

history antedating this appeal. By schedules which became effective on August 1, 1964, appellees-motor carriers established a general three percent increase in their transcontinental rates and charges. In response to a filed protest the Interstate Commerce Commission instituted an investigation into the lawfulness of this increase but decided, pending the outcome of its investigation, not to suspend the operation of the increase but rather to permit it to become effective. The ICC ultimately concluded, however, that the increase had not been shown to be just and reasonable and on April 15, 1966 it ordered that the rate increase be canceled before June 1966. Increased Class and Commodity Rates, Transcontinental, 326 I.C.C. 397. A petition for reconsideration was denied but the original cancellation order was modified so as not to become effective until September 12, 1966.

The motor carriers instituted an action in the United States District Court for the District of Colorado, seeking to set aside, annul and enjoin the rate cancellation order. The United States was joined with the ICC as a mandatory defendant under 28 U.S.C. §§ 2321-22. Appellants-shippers were permitted to intervene in this action. On September 9, 1966 a temporary restraining order was entered preventing the ICC from canceling the rate increase and on November 4, 1966 the court directed that this order remain in effect until a final judicial determination was made.

A three-judge district court was convened pursuant to 28 U.S.C. §§ 1336, 2325, and 2284. On January 5, 1967 the court vacated the rate cancellation order and remanded the matter to the ICC for further proceedings. Ringsby Truck Lines, Inc. v. United States, D.C. Colo., 263 F. Supp. 552. The court concluded that the findings and reasoning of the ICC were insufficient to support its holding and that a remand was necessary to afford the ICC an opportunity to articulate the basis of its holding.

The shippers appealed to the United States Supreme Court under 28 U.S.C. § 1253, contending that any restitutionary claim for excessive rates charged would be destroyed if the judgment of the district court were permitted to stand. On February 1, 1967, less than one month after the initial remand, the ICC affirmed its previous decision canceling the rate increase. Increased Class and Commodity Rates, Transcontinental, 329 I.C.C. 420. It articulated as the basis of its decision the failure of the motor carriers to sustain their burden of proof of establishing that the rate increase was just and reasonable with the type of evidence which they had been given notice to provide. The ICC conceded that the quantum of proof necessary to support an increase in motor carrier rates was different and heavier than that required in the years prior to 1963, but stated that this change had been set forth in its decisions in and after 1963 and in specific detail in an order entered on August 3, 1964. The motor carriers were directed to cancel the subject rate increase on or before March 10, 1967, but the order provided that its effectiveness would be stayed or postponed if a further complaint was filed in district court by one or more of the motor carriers prior to the March 10 compliance date.

The instant action was filed by the motor carriers on February 27, 1967, seeking to annul, set aside, and vacate the second ICC rate cancellation order. The three percent rate increase was superseded by a further increase which became effective on August 29, 1967. On September 4, 1968 the shippers were allowed to intervene in the instant action and counterclaim for restitutionary damages. Their appeal to the Supreme Court from the original three-judge decision was dismissed as moot. National Small Shipments Traffic Conference, Inc. v. Ringsby Truck Lines, Inc., 389 U.S. 576.

Because of the contingency provision of the second rate cancellation order, its effectiveness was stayed pending judicial disposition of the controversy. When no party pressed for trial the court, on its own motion, set the case to be heard on December 1, 1971. In a judgment entered March 2, 1972 the three-judge court vacated and set aside the second rate cancellation order and remanded the matter to the ICC for further appropriate proceedings. The issue of the shippers' restitutionary counterclaim was not addressed. Shippers again appealed to the Supreme Court and filed a protective appeal with this court. The ICC has taken no further action on the remand.

The ICC and the United States moved to dismiss the appeal in the Supreme Court for lack of jurisdiction. They contended that once the 1964 rate increase was superseded by the 1967 rates, the rate cancellation order lost all vitality except with respect to the possibility of restitution for charges collected in the interim. They thus argued that while the relief sought and granted was in form injunctive, it was in substantive effect only declaratory and retrospective. The motion to dismiss concluded that the three-judge procedures were not properly invoked, that the matter should have been referred to a single judge, and that the Supreme Court therefore lacked jurisdiction of the direct appeal.

Without articulating its reasons, the Supreme Court dismissed the appeal on October 24, 1972 for lack of jurisdiction, National Small Shipments Traffic Conference, Inc. v. Ringsby Truck Lines, Inc., 409 U.S. 943, and the shippers have now pressed their appeal before this court.

The motor carriers have challenged our jurisdiction to entertain this appeal. They argue that their complaint below sought injunctive relief against an ICC order under 28 U.S.C. § 1336, that under 28 U.S.C. § 2325 such

a complaint can be heard only by a district court composed of three judges, that the case below was properly decided by such a court, and that appeal therefrom lies only to the United States Supreme Court under 28 U.S.C. § 1253. They conclude that under 28 U.S.C. § 1291 courts of appeals are denied jurisdiction where direct review may be had in the United States Supreme Court.

We do not agree with this contention. The proper application of the rule of exclusive review upon which appellees rely necessarily depends upon whether the dispositive issue requires the consideration of a three-judge court, for the Supreme Court will not directly review a judgment of a three-judge court when such court was not required. Pennsylvania Public Utility Comm'n v. Pennsylvania R.R., 382 U.S. 281.

The appeal to the United States Supreme Court, brought by the shippers alone, was dismissed without opinion for lack of jurisdiction. In the absence of an articulated reason for this dismissal, we will not presume to engage in a meaningless exercise of reading that Court's mind. It is sufficient to note for our purposes that the appeal could have been dismissed because the Court felt that the three-judge court below was not required.

We are convinced that events occurring subsequent to the convening of the statutory three-judge court abrogated the necessity of such a court and that the dismissal of the shippers' appeal to the Supreme Court was justified on this ground alone. We are mindful of the fact that the complaint of the motor carriers as originally filed sought relief from the ICC rate cancellation order in a manner which was in form injunctive. At that time it properly would have been heard before a three-judge court pursuant to 28 U.S.C. §§ 1336, 2325, and 2284. This is so because the complaint was filed at a time in February 1967 when the ICC rate cancellation order

was directed at a current rate increase. When the case was finally heard before the three-judge court in 1971, however, that rate increase had been superseded by an August 1967 increase which had, in turn, been superseded by other increases. The necessity for a three-judge court to provide injunctive relief against the three percent rate cancellation order was therefore obviated and determination of the validity of the ICC order was of practical import only as it related to the restitutionary claim of the shippers for charges previously exacted. The ICC order thus became essentially one for the payment of money and was properly reviewable by a one-judge rather than a three-judge district court. Pennsylvania R.R. v. United States, 362 U.S. 202.

In Middlewest Motor Freight Bureau v. United States, 8 Cir., 433 F2 212, *cert. den.*, 402 U.S. 999, closely related factually to the case at bar, a three-judge court below dismissed an action brought by motor carriers for injunctive relief against an ICC rate cancellation order because superseding rate increases had mooted the issue of the cancellation order as between the ICC and the carriers.[1] In our opinion this procedure should have been followed in the case at bar.

The fact that a three-judge court was not required does not automatically render its judgment invalid. It merely constitutes a squandering of judicial energy and the proper procedure is simply to bring the appeal in the appropriate court of appeals. Moody v. Flowers, 387 U.S. 97.

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[1] In *Middlewest*, however, the three-judge court had entertained the shippers' counterclaim for restitution and had denied relief on equitable grounds. The appellate court held that while the three-judge court should not have considered the counterclaim because it was not within the statutory purpose of a three-judge court, the failure to dismiss the counterclaim did not invalidate the judgment. It merely rendered direct appeal to the Supreme Court inappropriate and the appeal properly lay before the appropriate court of appeals.

But the motor carriers maintain that there is a further impediment to our appellate jurisdiction in that the judgment below was not final. While it is true that the three-judge court vacated the ICC order and remanded the case "for such further proceedings as may be appropriate," our refusal to entertain this appeal on grounds of nonfinality would elevate form over substance. Although the court below did not address itself to the issue of the shippers' restitutionary counterclaim, it is clear that any right to restitution is dependent upon the validity of an ICC rate cancellation order which has twice been set aside by a three-judge district court. In fact both parties to this appeal agree that the judgment of the court below is final with respect to the validity of the ICC order. The ICC has taken no further action on the remand (an entirely understandable position in view of the fact that the rate increase which its order sought to cancel has been superseded). Any future action for relief brought by the shippers before a single judge would necessarily be subject to dismissal on grounds that the order upon which the cause of action depends has been vacated. In this important sense, the judgment of the three-judge court below is indisputably final.

The finality requirement of 28 U.S.C. § 1291 is meant to be given a practical rather than technical effect. Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541. To deny jurisdiction here would effectively signal the end of appellants' cause of action without any judicial review. We are aware that under normal circumstances a remand to an administrative agency for further proceedings is not a final judgment within the meaning of 28 U.S.C. § 1291. Boston & Maine R.R. v. United States, 358 U.S. 68; Pauls v. Secretary of the Air Force, 1 Cir., 457 F2 294. But we are unable to apply this rule where, as here, to do so would violate basic judicial principles. "Where the effect of a district court's order, if not reviewed, is

the death knell of the action, review should be allowed." Eisen v. Carlisle and Jacquelin, 2 Cir., 370 F2 119, 121, *cert. den.*, 386 U.S. 1035. The appeal is properly before this court.

We now proceed to a consideration of the judgment which vacated and set aside the ICC rate cancellation order and remanded the matter to the Commission for further proceedings. For reasons already discussed, we believe that the three-judge court below was not required and that it should have been dissolved, thereby enabling the shippers to bring their claim for restitution before a single judge. While the judgment below is nevertheless operative, we feel that the very fact that the court below felt that three-judge consideration was required resulted in its disposition of the case in a manner which was not responsive to the real issue in question.

As previously indicated, the sole remaining justiciable controversy when this case was heard in 1971 was the shippers' counterclaim for restitution. What was really at stake was the legality of charges exacted under the three percent rate increase between the time when the first rate cancellation order was scheduled to become effective and the time when the superseding increase became operative.[2] It was during this time that, but for the direct and indirect[3] effect of judicial action, the

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[2] In Wisconsin v. Federal Power Commission, 373 U.S. 294, rates charged by the Phillips Petroleum Company had been investigated by the FPC. The Court pointedly addressed the significance of a superseded rate:

> An increased rate which is later superseded by a further increase is thus effective only for the limited intervening period, called the "locked-in" period, and retains significance in § 4(e) proceedings only in respect of its refundability if found unlawful. 373 U.S. at 298 n.5.

[3] The direct judicial effect was the temporary restraining order issued after the first ICC rate cancellation order. The indirect effect was the provision in the second ICC order which allowed

motor carriers would have been unable to charge the increased rate.

The court below, at the outset of its opinion, properly stated that the crucial issue in determining the validity of the rate cancellation order was whether the ICC had given fair notice of its departure from standards employed in previous years relating to the quantum of evidence which would justify a rate increase. This issue was never resolved, the court concluding that the question of fairness of notice was "a debatable one." The court instead based its judgment on factors which we today hold were nongermane. Construing its role as one of determining the propriety of injunctive relief against an ICC order, the court's primary concern was the length of time which these rates had been in effect.

> Now they have been in effect for 6½ years. The presently effective rates are substantially higher. Without going into the multitudinous technical arguments relating to the change in Commission standards and the adequacy of the notice of those changes, we are convinced that there was "a period of uncertainty and room for misunderstanding," Wyoming v. Colorado, 309 U.S. 572, 582, *which makes unfair the 1971 rejection of rates which have been effective since 1964.* (emphasis added.)

While it is true that the three percent increase has technically been in effect since 1964, in the sense that it has never been finally canceled, in practical import the "effect" of the increase ceased to operate in August 1967 when it was first superseded. The increase is thus not a current, but rather a dated, one whose validity is important only to those who were charged thereon after the first ICC rate cancellation order was scheduled to become operative and before the superseding increase. The cru-

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for a stay if further judicial action was initiated prior to the order's designated compliance date.

cial issue, therefore, was whether the rate was just and reasonable during that period and proper consideration of the rate cancellation order should have been limited to its validity at the time it was issued. The deliberation of the court below was not so limited and in view of this we cannot let stand a judgment with such preemptive collateral consequences. The shippers are entitled to their day in court.

It is apparent that the court below perceived its function as one of determining a controversy between the ICC and the motor carriers. We have concluded that this controversy was moot and that ripeness existed only in the shippers' restitutionary claim. This claim the court below refused to entertain, and in its capacity as a three-judge court we think that this procedure was proper. This action belongs before a single judge and it may now be so brought. We therefore consider it inappropriate to make an essentially *de novo* determination of the validity of the ICC order in question. Any consideration of other issues raised by both parties relating to the restitutionary claim would be similarly premature.

The judgment of the court below remanding the action to the Commission is vacated and the case is remanded to the district court (one judge) with instructions to entertain appellants' claim.

APPENDIX B

MEMORANDUM OPINION OF THE DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 67-C-97

RINGSBY TRUCK LINES, INC., RIO GRANDE MOTOR WAY, INC., NAVAJO FREIGHTLINES, INC., ILLINOIS-CALIFORNIA EXPRESS, INC., DC INTERNATIONAL, INC., CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE, GARRETT FREIGHTLINES, INC., IML FREIGHT, INC., LEE WAY MOTOR FREIGHT, INC., PACIFIC INTERMOUNTAIN EXPRESS CO., T.I.M.E. FREIGHT, INC., TRANSCON LINES, UNITED-BUCKINGHAM FREIGHT LINES, WATSON-WILSON TRANSPORTATION SYSTEM, INC., and WESTERN GILLETTE, INC.,

Plaintiffs,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Defendants,

and

NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC. and DRUG AND TOILET PREPARATION TRAFFIC CONFERENCE,

Intervening Defendants.

MEMORANDUM OPINION AND ORDER

Per Curiam

This complicated rate case turns, in our opinion, on whether the Interstate Commerce Commission gave fair notice of its departure from standards employed in previ-

ous years and relating to the quantum of evidence which would justify a rate increase. The Commission held that it gave fair notice and denied the increase on the ground that it was not just and reasonable. The pending action was brought by 15 motor common carriers to annul and enjoin the Commission decision. The National Small Shipments Traffic Conference, Inc., and Drug and Toilet Preparation Traffic Conference were permitted to intervene. A history of the Commission and court proceedings is needed for an understanding of the controversy.

By schedules which became effective on August 1, 1964, the parties to certain motor common carrier tariffs established a general 3 percent increase in their transcontinental rates and charges. On April 15, 1966, the Commission cancelled the increases. Increased Class & Commodity Rates, Transcontinental, 326 I.C.C. 397. On suit by the carriers we issued a temporary restraining order enjoining the Commission's cancellation of the increase. The same parties that have intervened in the instant case also intervened in that case. On January 5, 1967, after hearing, we vacated and set aside the Commission's order and remanded the matter to the Commission for clarification of its reasoning. Ringsby Truck Lines, Inc. v. United States, D.C. Colo., 263 F. Supp. 552. This was followed by (1) a prompt reopening of the case by the Commission which, on February 1, 1967, affirmed its prior decision, see Increased Class & Commodity Rates, Transcontinental, 329 I.C.C. 420, and (2) an appeal to the Supreme Court by the intervenors which, on January 15, 1968, was dismissed as moot, see National Small Shipments Traffic Conference Inc. v. Ringsby Truck Lines, Inc., 389 U.S. 576. The Commission order provided that the filing before March 10, 1967, of a complaint challenging it would stay its effectiveness. The instant action was filed on February 27, 1967, and the stay has remained in effect. Our order permitting intervention was entered on September 5, 1968.

No party pressed for trial of the case. The court, on its own motion, set the trial for December 10, 1971. Various files, records, and affidavits were received. It appears therefrom that during the period 1967-1971 the Commission permitted various general increases in transcontinental rates and charges for common carriers. Although we are unable to derive the overall percentage of the general increase, the carriers presented the affidavit of an expert which says:

> "Considering only general increase, Plaintiffs' present rates on transcontinental shipments weighing 0-499 pounds are 38.87% higher than the rates placed under investigation in Docket No. 34462 [with which we are concerned]. The rates on shipments weighing 500 pounds and over are from 11.41% to 26.14% higher than those placed under investigation in Docket No. 34462."

It appears that the now effective rates are substantially higher than those which the Commission disallowed in its 1966 order. The result is that we are concerned only with the increase which applied to rates charged and collected between August 1, 1964, and the date in 1967 when the permitted increase became effective.

The decision of the Commission after our remand in the first case concedes a change of standards. The Commission said, 329 I.C.C. at 426:

> "The present decision admittedly departs from the standards employed in earlier years concerning the quantum of evidence that would justify an increase in rates."

Speaking generally, the carriers assert that the change is from judgment sampling to probability sampling. This may be an over-simplification but it points up the problem. As we understand judgment sampling, an expert presents a traffic study of representative carriers and

justifies a requested increase on that basis. In probability sampling, random selections are made of carriers and periods and the results of an analysis therefrom determine whether the rates are just and reasonable.

In its post-remand decision the Commission said that it had not changed from judgment sampling to probability sampling "but rather requires that any judgment sample be supported by adequate objective tests and data showing that it is representative," and that the carriers failed to make such showing, 329 I.C.C. at 427. In holding that the carriers had fair notice of the change, the Commission relies primarily on its August 3, 1964, order which among other things required actual cost and revenue data, operating ratios, a showing of the representative nature of the carriers used, and carrier-affiliate information.

To support their 1964 request for rate increases the carriers presented judgment sampling. The Commission rejected the showing because of the lack of details required by the August 3, 1964, order. The parties argue at great length the fairness of the notice given by the August 3, 1964, order and earlier but less persuasive Commission actions.

In our opinion the question of the fairness of the notice is debatable. The evidence which the carriers produced to justify the requested increase is outlined in our first decision, 263 F. Supp. at 554, and need not be repeated. The Hearing Examiner recommended that the increase be granted. He specifically found that "the study carriers were representative of the entire class affected, that the studies were in all respects proper, and that the carriers had demonstrated their need for additional revenue." *Ibid.* We mention this only because it seems to us that if the notice was as clear as the Commission and the intervenors now asserts, the Hearing Examiner, presumably an expert

on the subject, would have recognized and applied the new standards.

Three Commissioners dissented from the February 1, 1967, Commission order after remand in the first case. Commissioner Goff, joined by Commissioner Walrath, said (329 I.C.C. at 427):

> "The increase has been in effect for 2½ years. It is common knowledge that costs and prices have gone up significantly in that time. Moreover, we all know the industry is currently faced with another round of substantial wage increases. In elemental fairness I would not now require cancellation of the 3-percent increase. Instead I feel that we should reopen the proceeding to afford respondents an opportunity to supply the deficiencies in their case on the record. Also, in these days of rapidly mounting costs the evidence for 1963 is stale."

Commissioner Deason said (329 I.C.C. at 428):

> "The 3-percent general increase in rates which the majority has ordered canceled in this report has now been in effect 2½ years. Because of parallel increases in wages and other costs during this period, an updated record on further hearing could probably justify the higher rates. What I find particularly disturbing here is the majority's reluctance to give respondents the opportunity to overcome the division's objections to their cost study while these schedules remain in force.
>
> As I see it, the Commission has an affirmative role, within the framework of the act and the national transportation policy, to exercise a full measure of discretion and latitude in dealing with all problems that come before it. In my opinion, the majority's refusal to reopen this proceeding falls considerably short of that mission."

We agree with the dissenting Commissioners. When they spoke, the rates had been in effect for 2½ years.

Now they have been in effect for 6½ years. The presently effective rates are substantially higher. Without going into the multitudinous technical arguments relating to the change in Commission standards and the adequacy of the notice of those changes, we are convinced that there was "a period of uncertainty and room for misunderstanding," Wyoming v. Colorado, 309 U.S. 572, 582, which makes unfair the 1971 rejection rates which have been effective since 1964.

It is accordingly ordered that the Commission's order of February 1, 1967, is vacated and set aside and the matter is remanded to the Commission for such further proceedings as may be appropriate.

Dated at Denver, Colorado, this 1st day of March, 1972.

By the Court:

/s/ Jean S. Breitenstein
United States District Judge

/s/ Alfred A. Arraj
United States District Judge

/s/ Hatfield Chilson
United States District Judge

APPENDIX C

INTERSTATE COMMERCE COMMISSION

No. 34462

INCREASED CLASS & COMMODITY RATES,
TRANSCONTINENTAL

Decided February 1, 1967

Upon reconsideration, findings in prior report, 326 I.C.C. 397, supplemented, clarified, and affirmed.

Appearances shown in prior report.

REPORT AND ORDER OF THE COMMISSION ON RECONSIDERATION

BY THE COMMISSION:

In the instant proceeding approximately 1,400 motor common carrier respondents to tariffs published by the Rocky Mountain Motor Rate Bureau, Inc., filed a general 3-percent increase in their so-called transcontinental rates and charges, with certain exceptions not here material. Upon protest of numerous parties listed in the prior report, 326 I.C.C. 397, Division 2, Acting as an Appellate Division, by order of July 31, 1964, instituted an investigation into the lawfulness of such schedules without suspension of their effectiveness, and they became effective and have remained in effect since August 1, 1964. By order of August 3, 1964, discussed hereinafter, the division required the respondents to submit evidence.

Following the submission of further proof, and oral hearing for the purpose of cross-examination, the division by report and order of April 15, 1966, found the increase not shown to be just and reasonable and required the schedules to be canceled and the proceeding to be discontinued. The Division, Acting as an Appellate Division, subsequently denied the respondents' petition for reconsideration, and the schedules were ordered to be canceled as of September 12, 1966. A petition for a finding of general transportation importance was denied by order of the entire Commission on August 24, 1966.

The United States District Court for the District of Colorado in a case entitled *Ringsby Truck Lines, Inc.* v. *United States*, 263 F. Supp. 552, civil action No. 66-C-467, temporarily restrained the effectiveness of the division's order, and in an opinion of January 5, 1967, reversed and remanded the proceeding. The court, noting the apparent departures of the rationale of the division's report from other cases of the Commission, held it was unable to determine the real reasons for the division's decision, including whether the Commission actually changed the standard in this case from judgment sampling to probability sampling, whether it changed its quantum of proof required, whether the Commission simply did not believe the expert witness for the carriers, or whether the Commission concluded that the carriers did not comply with its procedural order of August 3, 1964. It, therefore, held that upon remand "the Commission should explain with some detail exactly how the carriers failed to prove their case and what standards are being applied." It added, that, "if the Commission concludes that the carriers did not disclose sufficient [sic] detailed data, it should explain what type of data it is requiring." The present report is being issued in response to the court's opinion.

At the outset we do not read the court's opinion as standing for the proposition that we may not depart from rationales of prior decisions, or that we may not change the quantum or nature of proof necessary to satisfy the statutory burden of proof upon reasonable notice. The present case, in the court's view, turns on the unclearness of the prior report over whether the division has applied a new standard of proof, particularly in light of the specific references to this proceeding in *Motor Carrier Probability Sampling Studies*, 329 I.C.C. 683. Much of the court's opinion deals with the question whether the quantum of proof adduced by the carriers was equal to the proof which the Commission has in the past held to be sufficient. The court addresses itself to this question because it does not find any clear indication in the prior report that any new quantum of proof was required by the order of August 3, 1964. The background of this five-page order,[1] issued by the division in numerous proceedings, requires explanation.

Prior to 1962, the Commission approved several general increases, often without detailed investigation. The general increases of the respondent motor carriers generally followed, and in certain ways supported, the increases required by the railroads to maintain their service. See *Transcontinental Motor Rates—Increases*, 49 M.C.C. 211, 213; *Transcontinental and Rocky Mountain Increases*, 54 M.C.C. 377, 378; *Transcontinental and Western Increases, 1952*, 61 M.C.C. 755, 756; *Increases, Transcontinental-Intermountain Coast*, 304 I.C.C. 15, 16-17. We explained the competitive situation of the modes of transportation in *Increased Freight Rates, E., W., and S., Territories, 1956*, 300 I.C.C. 633, 667-68, as follows:

> Whether the railroads will be able to maintain the increases here sought will depend largely upon

[1] A summary of its requirements was set forth in the prior report as part I of the appendix, 326 I.C.C. at 407-408.

> whether their principal competitors, the motor carriers, make similar increases in their freight rates and charges. The motor carriers are not parties to this proceeding, but obviously their entire rate structure and freight revenues will be indirectly affected by the decision in this case. * * *
>
> Railroad executives who testified that total freight revenues would be increased rather than reduced by the proposed increases based their opinion, in part, upon the fact that, in the past, motor-carrier rates have been quickly increased after a general freight rate increase by the railroads. In most cases if the motor carriers do not increase their rates, the railroads will not be able to maintain the increases. This fact is of particular significance when it is realized that the total revenues of the motor carriers subject to our jurisdiction are now more than half as much as those of the railroads subject to our jurisdiction.

The straitened condition of the Nation's railroads generally improved by the 1960's. While approving a general increase of the respondent motor carriers in 1963, we admonished that we were not satisfied with the quantum of evidence produced and stated:

> There is criticism that the respondents' evidence does not reveal in sufficient detail the extent to which their revenues and expenses are related to the transcontinental traffic on which the increases apply, and that some of the carriers providing data do not appear to move a substantial volume of such traffic. * * * In the future, studies should be made which reflect the revenues and expenses and their relationship to the specific traffic on which the increases are to apply.

General Increases—Transcontinental, 319 I.C.C. 792, 803. In an earlier proceeding, we stated that once we had typical cost and revenue evidence we would henceforth

require further evidence concerning the appropriate profit level. We specifically recognized that the particular operating ratio (93 percent) relied upon in the past was not an immutable standard and may well have become obsolete. *General Increases—Eastern Central Territory*, 316 I.C.C. 467, 481.[2]

In this context, division 2 (by Commissioner Freas) issued its order of August 3, 1964, in this proceeding. The order required "actual cost and revenue data and operating ratios specifically related to the traffic and territories involved." The order required "detailed data to establish the representative nature of the carriers used," and "in addition all pertinent evidence and supporting data for the individual representative carriers * * * specifically relating to the traffic and territories involved," including ratios of income to investment. The order required carrier-affiliate information; and further required:

> That the traffic studies to be submitted shall be based upon actual operations conducted during identical periods of time for each carrier, and the actual cost studies shall be based upon the operations of the same carriers as used in the traffic studies; and that the

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[2] The operating ratio, or ratio of expenses to revenues, of 93 percent was first adopted in the 1940's by this Commission. *Increased Common Carrier Truck Rates in the East*, 42 M.C.C. 633, 650; *Middle West General Increases*, 48 M.C.C. 541, 550. Operating ratios even then were not considered the sole standard of revenue need, 48 M.C.C. at 563; and since those years, as noted in the prior report (at 398), there have been "recurring attacks on the use of operating ratios as the principal criterion to justify revenue needs." These general attacks recently culminated in the decision of the entire nine-member Court of Appeals for the District of Columbia Circuit that specific findings and evidence other than bare operating ratios are necessary as a matter of law before an increase in rates may be allowed. *D. C. Transit System, Inc.* v. *Washington Metropolitan Area Transit Commission*, 350 F.2d 753 (1965). See also *General Increase-Middle Atlantic & N. Eng. Ter.*, 319 I.C.C. 168, 176-77; *LTL COR Rates Between East and Territories West*, 326 I.C.C. 174, 202.

periods of time selected for, as well as the motor carriers used in, such cost and traffic studies shall be shown to be representative and their selection statistically sound.

We at once note that when the order called for "detailed data," and that "such cost and traffic studies shall be shown to be representative and their selection statistically sound," that the order gave clear notice we would not accept a bare opinion that a particular group of carriers or a study period was representative. The order gave clear notice that we required objective evidence and would carefully decide the reasonableness of the opinion evidence of experts and consider the "force of their reasoning." [3]

Of course, respondents had never presented a witness' "judgment sample" of representative carriers in any past increase proceeding; nor had we relied on such opinions, unsupported by other evidence, in a general increase case. We required some further showing. For example, in *General Increases—Eastern Central Territory*, 316 I.C.C. 467, the carriers used a judgment sample that was shown to embrace 80 percent of the same carriers' revenues in the considered territory, and the study was readily reconciled with their reported data (at 471). Other objective tests of the sample were made available to us. The percentage distribution of the traffic for single-line and interline traffic was similar as between the traffic study and those carriers' annual reports to the Commission (at 494). Moreover, it was considered persuasive that the cost study carriers' participation in the considered traffic was over 66 percent of their total traffic (at 493).

A judgment sample can be made subject to objective tests and data that would show whether it is representa-

[3] Under the ruling of *Market Street R. Co.* v. *Comm'n.*, 324 U.S. 548, 560-61 (1945).

tive. If carriers seeking increased rates are grouped by relative size, a judgment sample adequately reflects the entire group, if it is shown that all sizes are reasonably represented. If carriers are grouped by relative efficiency (*e.g.*, according to their operating ratios), a judgment sample of such carriers must likewise be shown to reflect the characteristics of the entire group. If the figures are weighted, the witness must show why it is reasonable to permit the larger carrier to determine the outcome in the circumstances of that case.

In *LTL COR Rates—Between East and Territories West*, 326 I.C.C. 174, 197, we described further tests of a judgment sample that are available to an expert witness. A random sample may be taken of the remaining carriers, and the witness may either show that the remaining carriers are not significantly different from the study carriers, or if the remainder differ, apply the proper weights from the probability sample to correct for the differences.

In *Motor Carrier Probability Sampling Studies, Forms 2, 4, 7 and 10, supra*, we adhered to a prior judgment selection of carriers to participate in certain special studies only upon finding that we were concerned with sampling only this particular universe, or group of carriers, *all* of whom were included. We specifically found, "Given this universe, no statistical bias will exist so long as no carriers are excluded" (page 15). The discussion concerned the proper definition of the total group of carriers under study (the universe), rather than the proper method for sampling the universe or for testing the sample. That report does not require random sampling in all cases and does not govern here.

The sample of carriers in the present proceeding do not meet the standards of proof set forth in the order of August 3, 1964. No objective tests of the sample were

made, and no objective data were presented on this record to support the sample. As the court notes, the evidence consisted entirely of the opinion of one witness and the statements of company officials. The expert explained his choice on cross-examination in terms of, (1) his sample carriers "perform the principal transcontinental transportation;" (2) "by working with a numerically small group of carriers it was possible" to reflect both originating and interline traffic; and (3) the group produces "a substantial picture of the transportation characteristics of the transcontinental traffic."

No data was introduced to support these opinions, nor any showing made that the choice of carriers was statistically sound. His reasoning was not persuasive. The last two reasons apply to any sample and do not support the particular sample carriers chosen here. The first reason is not borne out by the record; there is no showing (1) of what proportion of the total transcontinental motor carrier traffic, participated in by 1,400 carriers, is handled by the 18 study carriers, or (2) that the study carriers perform the "principal" transcontinental transportation. The participation in this traffic is shown for 12 carriers without any data or reasons why these figures on participation prove an adequate sample. The cost study does not take into account the relative participation in transcontinental traffic of six carriers.

Eight of the carriers chosen by respondents for study were also studied by our staff in Statement No. 7-60. The inclusion of these eight carriers in respondents' study is not persuasive, since the staff study is limited to long-haul traffic, whereas the traffic that will bear the increase is both long-haul and short-haul.

Even if we were to assume that the study carriers were representative, we must nevertheless conclude that respondents did not prove that the period studied was

typical and statistically sound, as required by the order of August 3, 1964. Respondents' witness chose the "earliest possible dates for which the carriers could organize themselves." When the witness further stated that a week was taken for truckload traffic "in the middle of June to avoid peaks in traffic," the same reason would seem to apply to less-than-truckload traffic, but only 1 day was used for the latter. No objective test of the typicality of those dates was made to show they were statistically sound.

A third ground for finding that respondents did not meet their statutory burden of proof is their failure, although given notice under the express terms of the August 3, 1964 order, that we required "evidence and supporting data" justifying the amount of profit they wished to earn over and above their operating costs. The order required operating ratio evidence, and "all pertinent evidence and supporting data" regarding the rate of return "specifically relating to the traffic and territories involved."

The respondents presented no evidence of the rates of return the study carriers, or any other carriers, had earned, or would earn (with or without the increase), on the traffic that would bear the increase in the territories involved. The rate of return evidence was shown for the overall operation of the study carriers. The evidence, therefore, does not show us what returns would be made by the carriers on the traffic that would bear the increase. Of course, even if the carriers had presented these figures, their evidence would still be deficient under the standards of proof laid down by the Court of Appeals in the *D. C. Transit System, Inc., supra*, whether the carriers relied upon operating ratio or rate of return as the ultimate test of a fair profit.

The present decision admittedly departs from the standards employed in earlier years concerning the quantum of evidence that would justify an increase in rates. The August 3, 1964, order gave fair notice of this departure; and the witnesses that appeared for respondents were admittedly aware that the August order, consistent with earlier admonitions, laid new ground rules for this general increase proceeding. If respondents had required more time to prepare their case, an appropriate remedy was available to them.

The order of August 3, 1964 is not unique to this case, nor is our dissatisfaction with the presentation made by the respondent motor carriers. We have applied the standards of the August 3, 1964, order consistently in other cases since about 1963,[4] and we strongly believe that a need for additional revenue through increased rates of motor carriers requires no less a showing than we have prescribed.

Addressing ourselves to the specific questions raised by the court in its opinion, we find, (1) the Commission has not changed the standard in this case from judgment sampling to probability sampling, but rather requires that any judgment sample be supported by adequate objective tests and data showing that it is representative, which respondents have failed to do; (2) the quantum of proof necessary to support an increase in motor carrier rates is different and heavier than in the years prior to 1963, as set forth in decisions in and after 1963, and in specific detail in the order of August 3, 1964, in the present proceeding; and (3) the respondents' increases are disapproved, not for failure to present a credible witness or merely for failure to comply with

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[4] *E.g., General Increases, Between East and Territories West,* 329 I.C.C. 626; *LTL COR Rates—Between East and Territories West,* 326 I.C.C. 174; *Increased Rates, Southwest, Colorado, Wyoming,* 326 I.C.C. 216.

a procedural order, but for failing to sustain their burden of proof with the type of evidence of which they were given notice. We have shown wherein the carriers failed to prove their case, and what standards apply, including the type of objective tests of a judgment sample that can be introduced to support such a sample.

We affirm the finding of the prior report that the 3-percent general increase is not shown to be just and reasonable.

COMMISSIONER GOFF, whom COMMISSIONER WALRATH joins, dissenting:

The increase has been in effect for 2½ years. It is common knowledge that costs and prices have gone up significantly in that time. Moreover, we all know the industry is currently faced with another round of substantial wage increases. In elemental fairness I would not now require cancellation of the 3-percent increase. Instead I feel we should reopen the proceeding to afford respondents an opportunity to supply the deficiencies in their case on the record. Also, in these days of rapidly mounting costs the evidence for 1963 is stale.

COMMISSIONER DEASON, dissenting:

The 3-percent general increase in rates which the majority has ordered canceled in this report has now been in effect 2½ years. Because of parallel increases in wages and other costs during this period, an updated record on further hearing could probably justify the higher rates. What I find particularly disturbing here is the majority's reluctance to give respondents the opportunity to overcome the division's objections to their cost study while these schedules remain in force.

As I see it, the Commission has an affirmative role, within the framework of the act and the national trans-

portation policy, to exercise a full measure of discretion and latitude in dealing with all problems that come before it. In my opinion, the majority's refusal to reopen this proceeding falls considerably short of that mission.

It is ordered, That the above-entitled proceeding is hereby reopened for reconsideration on the record as made;

It is further ordered, That for the reasons set forth in the above report the respondents herein are hereby notified and required to cancel on or before March 10, 1967, the schedules described in the order entered on July 31, 1964, by Division 2, Acting as an Appellate Division, upon not less than 1 day's notice to this Commission and to the general public by filing and posting in the manner prescribed by the Commission under section 217 of the Interstate Commerce Act;

It is further ordered, That since the remand of the United States District Court for the District of Colorado occasions this report and order, the compliance date of March 10, 1967, shall be stayed and postponed, if the Office of the Secretary or the Office of the General Counsel is served with a further complaint by one or more respondents in that or another court before such date, which postponement shall continue pending such further review proceedings.

And it is further ordered, That this proceeding be, and it is hereby, discontinued.